IN THE SUPREME COURT OF TONGA

CIVIL JURISDICTION

NUKU'ALOFA REGISTRY **CV 115 of 2010**

BETWEEN : COMMERCIAL FACTORS LIMITED

Plaintiff

AND: The Executors (or alternatively the Administrator) of the Estate of DR. SAM LIN WANG deceased.

First Defendant

AND: HELEN CHEN WANG

Second Defendant

BEFORE THE HON. CHIEF JUSTICE

R. E Harrison Q C with Ms. M. Tu'ilotolava for the Plaintiff
W. Edwards for the Second Defendant

JUDGMENT

[1] The writ was filed on 16 July, 2010. It was accompanied by an ex parte application for a Mareva Injunction, an application for the appointment of the Second Defendant to represent the First Defendant and by an application for summary judgment against the Defendants brought pursuant to the provisions of SCR O. 15.

[2] On 16 July, 2010 the injunctive relief was granted and the Second Defendant was appointed as representative of the First Defendant. This is the application for summary judgment and, if granted, for the appointment of a receiver to enforce the judgment.

[3] The following affidavits were filed:

(i) Terence John Frederick Haydon, 13 July 2010
(ii) Helen Chen Wang, 13 August 2010
(iii) Helen Chen Wang, 6 October, 2010
(iv) Terence John Frederick Haydon, 5 November, 2010
(v) Grant Maxwell Illingworth, 5 November, 2010
(vi) Jimmy Jinhua Deng, 9 November, 2010

[4] The Statement of Claim claims the sum of NZ$5,731,135.56 which sum is said to have become due following advances made to a company owned by the Defendants, Golden Gate Supermarket and Wholesalers Ltd, under the terms of a debt factoring facility agreement. These advances were guaranteed by the Defendants by a deed of guarantee and indemnity entered into on the same date, 4 May, 1998.

[5] Three lines of defence emerge from the Statement of Defence filed on 27 September, 2010. While not denying the advances, the Defendants plead limitation either by operation of the Limitation Act 1950 of New Zealand or the Supreme Court Act of Tonga (Cap 10- Section 16). Secondly, it is said that the Plaintiffs had an obligation, not fulfilled, first to seek recovery of any amount due from the principal debtor, Golden Gate. Thirdly, the Second Defendants pleads that she did not agree to or execute any of the agreements before the sums loaned were advanced and that none of these agreements were disclosed to her.

[6] In support of the application for summary judgment Mr. Harrison filed a comprehensive written submission for which I am most grateful.

[7] It will be convenient to deal with the limitation question first. It is not in dispute that the various agreements entered into by the parties took place in New Zealand and that the advances were also made in New Zealand. Sometime after the final sum was advanced and before any demand for repayment was made, either explicitly or by implication, the Defendants had moved to Tonga. In paragraph 28 of the Statement of Defence it is pleaded that whether under the New Zealand Limitation Act or under the Tonga Supreme Court Act, the action is statute-barred.

[8] The question that arises is which of these two provisions is applicable. In paragraphs 32 to 49 of his submissions Mr. Harrison argued that the New Zealand Limitation Act should apply. This being an action upon a deed (as pleaded in the first alternative) the period of limitation is 12 years from the date on which the cause of action accrued (section

4(3)). Alternatively, as an action in debt, the limitation period is six years (section 4(1) (a)). Under the Supreme Court Act, however, “it shall not be lawful to sue any person for debt…after the expiration of 5 years from the date on which such liability was incurred..”. Both statutes make provision for time to run again after a fresh acknowledgment of debt (section 25 (4) in the New Zealand Act and the sentence beginning. “But if any part…” in Section 16 of the Supreme Court Act).

[9] While acknowledging the value of Mr. Harrison’s legal research on this issue and while accepting the force of his arguments, particularly at paragraphs 47 to 49, I am of the view that the wording of section 16 is plain and prevents any action being brought in the Supreme Court of Tonga by any person to recover any sum howsoever due and wherever the debt was incurred, after the period of 5 years has elapsed from the date on which the liability was incurred unless these has been a fresh written acknowledgment of the debt. I therefore hold that the 5 years limitation period applies. The next question is whether there was a written acknowledgment of the debt no more than 5 years before the writ was issued.

[10] The Plaintiff relies on Exhibit D to the second Haydon affidavit, dated 5 November, 2010 (pages 00037 to 00046) (and see also affidavit of Jimmy Jinhua Deng). The circumstances in which the documents in Exhibit D came to be created are set out in paragraphs 14 to 22 of the affidavit. This affidavit was not answered by the Second Defendant.

[11] Having examined this Exhibit 15 and page 00045 in particular I am satisfied that the First Defendants, on 12 August 2005, within the 5 year limitation period, acknowledged that he had incurred a debt of NZ$3 million “successively taken from Mr. Terry Haydon, a New Zealand businessman…for the opening of a supermarket….in Auckland, New Zealand”. In my opinion it cannot reasonably be doubted that the debt referred to by the first Defendant was the debt which is the subject matter of this action and indeed Mr. Edwards did not seek to persuade me that this was not the case.

[12] The main focus of Mr. Edwards submissions on the limitation issue was the date on which demand for repayment had been made. His suggestion was that the effect of paragraph 12 of the Statement of Claim “and the supporting documents” was that demand for repayment had been made in 2001. This is also the position of the Second Defendant set out in paragraph 5 of her second affidavit.

[13] The Plaintiff's position on the question of demand is that set out in the second Haydon affidavit paragraphs 7 and 15 to 23: that no formal demand had been made in 2001, and that in fact, there had never been a formal demand complying with clause 8 of the deed of guarantee (Exhibit 17 to the first Haydon affidavit, page 13). In view of clause 9 (c) no formal demand was required.

[14] Mr. Edwards was unable to point to any document in support of his suggestion that demand was made in 2001 and I do not read paragraph 12 of the Statement of Claim as supporting his submission. I have already found it established that the First Plaintiff acknowledged his debt in 2006 and find nothing in the paper or arguments before me to affect the consequences of that finding.

[15] For the above reasons I am satisfied that the limitation defence cannot succeed. The next question is the Second Defendant's liability as a guarantor.

[16] As will be seen from paragraphs 10, 14, 26 and 27 of the Statement of Defence, the Second Defendant denies being bound by the guarantee because she states that she was not advised of and did not consent to the advances made after the guarantee was signed.

[17] The guarantee, Exhibit A to the first Haydon affidavit, provides (paragraph 1) that the guarantors "guarantee to the [Plaintiff] the punctual payment by the customer (Golden Gate) of all moneys which may now or shall at any time be or became owing or payable by the customer to the purchaser on any account whatsoever". This undertaking by the guarantors (including the Second Defendant) is not subject to any condition such as those advanced on the Second Defendant's behalf. Mr. Edwards was unable to refer me to any authority in support of the suggestion that the advances needed the guarantor's consent before they became subject to the guarantee. In the absence of any provision in the guarantee or any authority supporting Mr. Edwards proposition (which seems to be inconsistent with a guarantor's very limited rights as explained in *Lep Air Services v Rolloswin Ltd* [1973] AC 331, 349 A-C and 356, 357 H-A) I find no reason to depart from the plain wording of the guarantee. I also take into account the unanswered evidence of Mr. Haydon in paragraphs 24 to 27 of his second affidavit and take note of the substantial sums advanced by the Plaintiff direct to the Second Defendant, evidence of which is Exhibit E to that affidavit. In my view this

limb of the Second Defendant's case is bound to fail.

[18] The circumstances in which summary judgment will be granted were considered by Ward CJ in *ANZ Banking Group Ltd v Minister of Civil Aviation* [2003] To S.C 40. The principles guiding the Court in Tonga are the same as those in England (see *Anglo-Italian Bank v Wells* (1878) 38 L.T. 197). In the present case I am satisfied that neither of the Defendants has any defence to the claim and that there is no fairly arguable point to be argued on their behalf. Accordingly there will be judgment for the Plaintiff in the sum of the Tongan Pa'anga equivalent to NZ$5,731,135.56.

[19] Before specifying the appropriate rate for conversion, making any order for interest upon the sum due or appointing a receiver, I will hear counsel.

Dated: 14 January, 2011 **CHIEF JUSTICE**